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IN THE
COURT OF APPEALS OF INDIANA

SHELDON SWARTZENTRUBER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0512-CR-624
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable James W. Rieckhoff, Judge
Cause No. 20D01-0410-FC-141

September 27, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Sheldon Swartzentruber appeals his conviction for battery as a class C felony.[1] We affirm.

Issues

Swartzentruber presents three issues, which we restate as:

I. whether the trial court properly instructed the jury;

II. whether the State presented sufficient evidence; and

III. whether the trial court properly ruled on various evidentiary questions.

Facts and Procedural History

The facts most favorable to the conviction reveal that on August 11, 2004, after working until 11:00 p.m., Swartzentruber went to a bar. In the early morning hours of August 12, 2004, just outside that bar, Swartzentruber hit Kenneth Garland in the face three times. Garland's vision "started fading," and he fell to the ground. Tr. at 199. A bartender stepped outside, spoke with Swartzentruber, and walked back in the bar with him. Garland's daughter and her boyfriend arrived in a truck, picked up Garland, took him home, and then later that day transported him to a hospital.

At the hospital, the emergency room physician found bruising below Garland's eye, a scrape on his cheek, and tenderness on the left side of his face. An X-ray and CAT scan revealed various facial fractures, including a broken nose. Garland received medication at the hospital as well as a prescription for a strong painkilling medicine. He eventually underwent plastic surgery on his face.

On August 16, 2004, at the police station, Garland reported the incident, but noted that he did not know who had hit him. Police learned Swartzentruber's name from the bartender who had been at the bar on the night in question. Thereafter, Garland was shown a photo array from which he identified Swartzentruber as the person who stood outside the bar the night he was injured. Linda Groves, who had seen Swartzentruber hit Garland in the head at the bar that night, also identified Swartzentruber from a photo array.

On August 20, 2004, an investigating detective contacted Swartzentruber at his place of employment and met with him in the human resources department. Upon seeing the detective, Swartzentruber began emptying his pockets and giving the contents to his "fiancée," a woman who had accompanied him to the human resources office. Tr. at 324. The detective asked why Swartzentruber was doing that, and Swartzentruber replied that he "thought he was gonna go to jail for a battery." *Id*. at 326. When told that the detective simply wished to schedule an interview time, Swartzentruber returned his belongings to his person.

On October 18, 2004, the State filed an information charging Swartzentruber with battery resulting in serious bodily injury, a class C felony. App. at 9. One year later, after a two-day trial, a jury found Swartzentruber guilty as charged. *Id*. at 43; Tr. at 478. On December 2, 2005, the court imposed the following sentence:

> 4 years IDOC w/credit for one day served plus equal earned credit time, suspended; reporting probation for 4 years; probation user fee; obtain anger management assessment and follow-up; participate in the Victim Offender Reconciliation Program (VORP) through the Center for Community Justice to determine restitution due victim; $500 fine + costs, w/fine suspended; perform

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[1] Ind. Code § 35-42-2-1(a).

180 hours of community service restitution through the Center for Community Justice.

App. at 85.

Discussion and Decision

I. Instructions

Swartzentruber asserts that fundamental error occurred because the final jury instructions did not include the lesser offense of class A misdemeanor battery, the definition of "reasonable force," or the definition of "extreme pain," nor did they explain the burden of proof when self-defense became an issue. Appellant's Br. at 7. Having neither offered alternative instructions nor objected at trial to the jury instructions given by the court, Swartzentruber must show fundamental error to avoid waiver. *See Sanchez v. State*, 675 N.E.2d 306, 308 (Ind. 1996). We address each of his four instructional error allegations, though in a slightly different order.

"Fundamental error is error that represents a blatant violation of basic principles rendering the trial unfair to the defendant and, thereby, depriving the defendant of fundamental due process." *See Borders v. State*, 688 N.E.2d 874, 882 (Ind. 1997). The error must be so prejudicial to the rights of the defendant as to make a fair trial impossible. *Id*. "In determining whether a claimed error denies the defendant a fair trial, we consider whether the resulting harm or potential for harm is substantial." *Townsend v. State*, 632 N.E.2d 727, 730 (Ind. 1994). "The element of harm is not shown by the fact that a defendant was ultimately convicted; rather, it depends upon whether his right to a fair trial was detrimentally affected by the denial of procedural opportunities for the ascertainment of truth to which he otherwise

would have been entitled." *Id*.

Our supreme court has outlined a three-step analysis to be used by trial courts when determining whether instructions on lesser included offenses should be given. *See Wright v. State*, 658 N.E.2d 563, 566 (Ind. 1995). The court must determine: (1) whether the lesser included offense is inherently included in the crime charged; if not, (2) whether the lesser included offense is factually included in the crime charged; and, if either, (3) whether a serious evidentiary dispute existed whereby the jury could conclude the lesser offense was committed but not the greater. *Id*. at 566-67; *see also Clark v. State*, 834 N.E.2d 153, 156 (Ind. Ct. App. 2005). A lesser offense is necessarily included within the greater offense if it is impossible to commit the latter without having committed the former. *See Iddings v. State*, 772 N.E.2d 1006, 1016 (Ind. Ct. App. 2002), *trans. denied*.

According to the pertinent statute,

> (a) A person who knowingly or intentionally touches another person in a rude, insolent, or angry manner commits battery, a Class B misdemeanor. However, the offense is:
> (1) a Class A misdemeanor if:
> (A) it results in bodily injury to any other person; . . . .
> (3) a Class C felony if it results in serious bodily injury to any other person or if it is committed by means of a deadly weapon[.]

Ind. Code § 35-42-2-1. It is impossible to commit battery causing serious bodily without committing battery causing bodily injury; therefore, the class A misdemeanor offense is an inherently lesser included offense to the class C felony offense. Thus, we examine whether a serious evidentiary dispute existed whereby the jury could conclude that the A misdemeanor battery was committed but not the C felony.

"Serious bodily injury" means "bodily injury that creates a substantial risk of death or

that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss, impairment of the function of a bodily member or organ, or loss of a fetus." Ind. Code § 35-41-1-25. The evidence revealed that Garland arrived at a hospital emergency room with pain, bruising, and a scrape to his face. Tr. at 148. According to Garland, his injuries "hurt like hell." *Id*. at 182. Upon examining Garland, the attending physician ordered an X-ray, which revealed four separate facial fractures. *Id*. at 149. The radiologist who performed and interpreted the X-ray recommended a CAT scan, "a more specific x-ray." *Id*. at 150. The CAT scan showed a broken nose and "several" broken bones beneath the eye. *Id*. at 152. The treating physician gave Garland pain medication, prescribed Lortab, a "strong pain medication" commonly known as Vicodin or Hydrocodone, and recommended that Garland see a specialist who could perform surgical repair. *Id*. at 152-53. Two days later, an observer described Garland's facial injuries as "horrible." *Id*. at 212. Garland followed up with a plastic surgeon, who "installed three titanium plates in [his] face and a piece of Kevlar steel," which would "keep [his] eyeball from eventually sinkin' back in the socket." *Id*. at 182. As of the date of trial, Garland's nerve endings had not yet completely healed, and he still experienced discomfort, irritation, a twitching sensation, and sensitivity from his injuries. In light of the aforementioned, we cannot say that a serious evidentiary dispute existed regarding whether Garland received "serious" bodily injury in the form of extreme pain. Swartzentruber has not demonstrated fundamental error in the trial court's "failure" to read a class A misdemeanor battery instruction when none was requested.

Turning to Swartzentruber's related argument challenging the lack of a final instruction defining "extreme pain," we are equally unmoved. The charging information

alleged that Swartzentruber knowingly or intentionally touched Garland in a "rude, insolent, or angry manner, which . . . resulted in serious bodily injury, to wit: extreme pain[.]" Appellant's App. at 9. "Extreme pain" is not a term of art, and we are unaware of any unusual legal meaning for it in this context. *See Blanchard v. State*, 802 N.E.2d 14, 33 (Ind. Ct. App. 2004) (noting "generally, the use of a term of art in a jury instruction requires a further instruction explaining the legal definition of the word" and citing *Abercrombie v. State*, 478 N.E.2d 1236, 1239 (Ind. 1985)). Accordingly, we see no problem with the jury applying the common definition for "extreme." Further, we cannot envision jurors erroneously thinking that "extreme" means "slight, trivial, [or] minor" and jeopardizing Swartzentruber's rights. *See* Appellant's Br. at 18. To the contrary, given the evidence presented, the jury could easily have found that Garland suffered "great, severe, [or] intense" pain. *See id*. Swartzentruber has not shown how fundamental error could have occurred in the failure to read an un-offered instruction defining a term that has no special legal definition.

Final Instruction 9, which Swartzentruber claims does not define "reasonable force" in the context of a self-defense claim or adequately explain the defense's burden of proof, reads as follows:

> The evidence in this case raises an issue whether the defendant acted in self-defense.
>
> A person may use reasonable force against another person to protect himself from what he reasonably believes to be the imminent use of unlawful force. However, a person may not use force if he is committing a crime directly and immediately connected to the other person's actions.

App. at 39. The relevant portion of the self-defense statute, Indiana Code Section 35-41-3-

2(a), is very similar, providing: "A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force." Reasonable force is not statutorily defined. In case law, reasonable force is often described as proportionate to the situation. *See Geralds v. State*, 647 N.E.2d 369, 373 (Ind. Ct. App. 1995), *trans. denied*, and *Martin v. State*, 784 N.E.2d 997, 1006 (Ind. Ct. App. 2003). This is in keeping with the common understanding of the word "reasonable." *See* Merriam-Webster On-Line Dictionary, reasonable, http://www.m-w.com/dictionary/reasonable (last visited Aug. 31, 2006) (defining "reasonable" as moderate, fair, "not extreme or excessive"). Accordingly, we do not know how providing a definition of reasonable, which is the same as the common meaning of the word, would have altered the outcome here. We are similarly perplexed as to how the failure of the self-defense instruction to set out the elements that *Swartzentruber* had to prove could have adversely affected his rights. If anything, Swartzentruber *benefited* from the omission of his burden. Again, Swartzentruber has not demonstrated fundamental error.

II. Sufficiency

In challenging the sufficiency of the evidence, Swartzentruber reiterates his theory of self-defense. In essence, he maintains that Garland was the aggressor, and that Swartzentruber responded with defensive force that was not excessive. Swartzentruber also takes issue with the sufficiency of the evidence to support the element of "extreme pain."

In reviewing sufficiency challenges, we "neither reweigh the evidence nor judge the credibility of witnesses." *Sanders v. State*, 704 N.E.2d 119, 123 (Ind. 1999). Instead, we consider the evidence most favorable to the conviction and all reasonable inferences to be

drawn therefrom. *See id.* If the evidence and inferences provide substantial evidence of probative value to support the conclusion of the trier of fact, then we will affirm. *See id*. The trier of fact is free to believe or disbelieve witnesses, as it sees fit. *McClendon v. State*, 671 N.E.2d 486, 488 (Ind. Ct. App. 1996). The uncorroborated testimony of the victim is sufficient to sustain a conviction. *Hubbard v. State*, 719 N.E.2d 1219, 1220 (Ind. 1999). "The standard of review for a challenge to the sufficiency of evidence to rebut a claim of self-defense is the same as the standard for any sufficiency of the evidence claim." *Sanders*, 704 N.E.2d at 123.

The State had to prove that Swartzentruber knowingly or intentionally touched Garland in a rude, insolent, or angry manner, which resulted in extreme pain. *See* Ind. Code § 35-42-2-1(a); App. at 9 (charging information). When Swartzentruber raised the theory of self-defense, the State was free to rebut his claim by relying on the evidence elicited in its case-in-chief. *See Wilcher v. State*, 771 N.E.2d 113, 116 (Ind. Ct. App. 2002), *trans. denied*. Without citation to authority, Swartzentruber asserts that evidence of injury cannot be used as the basis for determining that excessive force was used in self-defense. Appellant's Br. at 24. Yet, we have stated, "[i]n determining whether the degree of force that the defendant exerted exceeded the bounds justified to defend himself or a third person, the extent and severity of the victim's injuries are relevant." *Martin v. State*, 784 N.E.2d 997, 1006 (Ind. Ct. App. 2003). The evidence most favorable to the verdict, including evidence of Garland's various injuries, reveals that even if Garland initially "g[ot] in [Swartzentruber's] face,"[2] Swartzentruber's response was well beyond the bounds of what could be characterized as

reasonable, proportionate, or fair. Furthermore, without rehashing the detailed evidence regarding Garland's injuries, we conclude that there was more than sufficient evidence to support a determination of extreme pain. Swartzentruber's arguments to the contrary are simply invitations for us to reweigh evidence and judge credibility. We are not at liberty to accept such invitations.

III. Evidentiary Rulings

Swartzentruber challenges three evidentiary rulings. First, he contends that his hearsay objection to a police officer's testimony should have been sustained because the substance of the testimony was not about the course of the investigation. Second, he maintains that his objection to the prosecutor's demonstration should have been sustained. Third, Swartzentruber argues that he should have been permitted to testify to the sequence of events that occurred after he was brought back into the bar by the bartender.

Our supreme court has stated:

> [T]he decision to admit or exclude evidence is within a trial court's sound discretion and is afforded great deference on appeal . . . . [W]e will not reverse the trial court's decision unless it represents a manifest abuse of discretion that results in the denial of a fair trial. An abuse of discretion in this context occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court or it misinterprets the law.

Carpenter v. State, 786 N.E.2d 696, 702-03 (Ind. 2003) (citations omitted). In reviewing an evidentiary decision, "we consider the evidence in favor of the trial court's ruling and any unrefuted evidence in the defendant's favor." *Johnson v. State*, 831 N.E.2d 163, 169 (Ind. Ct. App. 2005), *trans. denied*.

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[2] Appellant's App. at 289-90 (witness statement).

A. Police Officer's Testimony Regarding Course of Investigation

Garland reported the battery to Captain Keith Miller at the Goshen Police Department. Captain Miller testified at trial as follows.

> Q. At some point, did you take a report involving a Battery with a victim by the name of Kenny Garland?
> A. Yes.
> Q. Okay. Let's start off by telling the members of the jury *how this started and what you did in response to that*, if you could please.
> A. Okay. I believe it was on August 16th, approximately – about one-thirty Mr. Garland came on station – to the Police Department to file a Battery report, and I was on station I believe at that time, or was called in; I don't recall, but I ended up coming in to take the report.
> Q. Did you actually meet with Mr. Garland at the Police Department on that date?
> A. Yes.
> Q. What did you find out from Mr. Garland had taken place?
> A. He advised a few days –
>
> > [At this point, the defense lodged a hearsay objection. The prosecutor responded with "course and scope of the investigation. I'm not offering it for the truth of the matter asserted." The court overruled.]
>
> A. He advised a few days prior he had been at the Double D's bar in Goshen, and had made arrangements with his daughter and her boyfriend for them to pick him up at approximately one-thirty in the morning. He was at the bar with a friend named Billy Ford. They were there, obviously drinking, and also for karaoke night – I guess to sing. At approximately one-thirty he advised he went outside, his daughter and her boyfriend arrived, he went back inside the bar to get his friend Billy, couldn't find Billy, went back outside the front door, and apparently just as he cleared the front door was struck in the face. Doesn't know by who or with what. As he was going to the ground, or just got to the ground, he advised he was struck a couple more times. He advised he thinks he blacked out for a while there. He remembers walking down Plymouth Avenue; he said he didn't know why, then he was picked up by his daughter Naomi and her boyfriend Travis and – and taken home. And then shortly after that taken to the hospital.

App. at 110-11 (emphasis added).

When the admissibility of an out-of-court statement received by a police officer

during the course of an investigation is challenged as hearsay, we first determine whether the testimony describes an out-of-court statement that asserts a fact susceptible of being true or false. *Hernandez v. State*, 785 N.E.2d 294, 298 (Ind. Ct. App. 2003) (citing *Craig v. State*, 630 N.E.2d 207, 211 (Ind. 1994)), *trans. denied*. If the statement contains no such assertion, it cannot be hearsay and the objection should accordingly be overruled. *Id*.; *see also* Ind. Evidence Rule 801(c).

If the statement contains an assertion of fact,

> we consider the evidentiary purpose of the proffered statement. If it is to prove the fact asserted, is not from a witness or a party, and there are no applicable hearsay exceptions, the statement is inadmissible as hearsay. If the statement is offered for a purpose other than to prove the truth of the matter asserted, we consider whether the fact to be proved is relevant to some issue in the case and whether the danger of unfair prejudice that may result from its admission outweighs its probative value.
>
> Relevance is the tendency to make a fact of consequence to the determination of the action more or less probable. If the fact sought to be proved under the suggested non-hearsay purpose is not relevant, or if it is relevant but its danger of unfair prejudice substantially outweighs its probative value, the hearsay objection should be sustained. This rationale is applicable in analyzing the admissibility of evidence the State argues is admissible because it merely describes the course of police investigation.

Vertner v. State, 793 N.E.2d 1148, 1151-53 (Ind. Ct. App. 2003) (citations omitted).

We believe that Captain Miller's testimony excerpted *supra* was hearsay, as it was an out-of-court statement that asserts a fact susceptible of being true or false. However, the State argues that the testimony was offered for a purpose other than to prove the truth of the matter asserted, that is, to explain subsequent conduct in the investigation. Indeed, Captain Miller was answering the two-part question of "how this started" and "what [he] did in response to that" when he testified regarding Garland's report of the incident. App. at 110.

Accordingly, we consider the relevance of the course of police work and whether the danger of prejudice in admitting this evidence substantially outweighed its probative value. *Cf. Vertner*, 793 N.E.2d at 1153. Here, the relevance was high in explaining how the investigation proceeded. The danger of prejudice was minimal since the information was cumulative of Garland's testimony. *See Maxey v. State*, 730 N.E.2d 158, 162 (Ind. 2000) (determining any error in admission of out-of-court statements was harmless because statements were "cumulative of other direct, non-hearsay testimony"). Thus, the trial court did not abuse its discretion in overruling the defense's objection.

B. Prosecutor's Demonstration

During cross-examination, the State attempted to elicit the exact details of the altercation. *See* Tr. at 425-40. Swartztentruber explained that Garland's right hand was on Swartzentruber's left shoulder, that his other hand was on Swartzentruber's chest, and that Swartzentruber used his elbow/fist to strike Garland three times on the left side of his face. However, confusion remained regarding the precise positions of the men and the sequence of events. At one point the prosecutor apparently made a movement in an attempt to visually show how Swartzentruber struck Garland, and then asked if that was correct. Swartzentruber answered, "Yes. That is correct," at which moment defense counsel interjected: "Your Honor, that – what – what [the prosecutor] just did is not what [Swartzentruber] has described. He described his right elbow coming hitting the left side of Mr. Garland, not his right elbow like [the prosecutor] just did. That movement – that's not the correct movement from what mister . . . . ." App. at 267-68. The prosecutor then cut in with, "Your Honor, this is cross-examination and the jury can make its own decision," and the trial court overruled

the defense's objection. *Id.* at 268.

Although Swartzentruber's challenge to the prosecutor's demonstration appears in the appellant's brief under the admission/exclusion of evidence section, Swartzentruber does not make an evidentiary argument per se. Rather, his argument is more appropriately characterized as one regarding professional conduct. He asserts that the prosecutor was misrepresenting the facts being testified to by Swartzentruber and that the prosecutor's advocacy was prejudicial to the administration of justice. Appellant's Br. at 35-38 (citing Ind. Professional Conduct Rule 3.3(a)(1) and comments). Specifically, Swartzentruber contends that the prosecutor's "statements, through his conduct, were false and the jury should have been instructed to disregard his demonstration," and/or that the defense objection should have been sustained. *Id*. at 38 (citing *Kiner v. State*, 643 N.E.2d 950, 953 (Ind. Ct. App. 1994)).

Indiana Rule of Professional Conduct 3.3(a) provides: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]" Preliminarily, we note that our review of this issue is hampered by the fact that we were not witness to the prosecutor's arm movements. Notwithstanding this obvious problem, we have difficulty comprehending how Swartzentruber could have been prejudiced when he actually agreed that the prosecutor's portrayal of his arm movements was correct. Moreover, our review of the relevant portions of the transcript reveals no evidence that the prosecutor "knowingly" made a false "statement." If the prosecutor was incorrect in interpreting Swartzentruber's testimony, this was hardly the sort of "blatant misrepresentation" or deceit

prohibited by *Kiner*. 643 N.E.2d at 953-54 (concluding that trial court properly admonished jury to disregard testimony regarding misidentification of photograph that was procured as result of defense counsel's misrepresentation). Furthermore, we are confident that the jurors, who heard more than fifteen pages of testimony regarding the altercation and who were alerted to the possible inaccuracy of the prosecutor's arm movements by the defense's objection and the State's reply, could fairly make its determination as to how the incident happened. The trial court's decision to overrule the defense objection was not a manifest abuse of discretion.

C. Swartzentruber's Testimony About Sequence of Events After Altercation

After Swartzentruber testified as to his version of both the altercation and what led up to it, defense counsel began questioning him about what occurred immediately thereafter.

> Q. [by defense counsel]: Okay. Did anybody else come out of the bar after this incident with Mr. Garland?
> A. Yes. Whenever I had found my glasses and I picked 'em up and I was puttin' on, ah, Big Dave, ah, had came out the door and I was still, ah, -- I guess my adrenaline was flowin' – and I said, *"Dave, this guy just attacked me."* And he said come inside and tell me what happened, and he took me inside.
> . . . .
> Q. Did you go back in the bar?
> A. Yes. I went back in with Dave.
> Q. Okay. And [what] did you do once you got back in the bar?
> A. Um, Dave took me to the table. Um, whenever you go through there's like a alley way with the bars on each side and then past the one bar on the left there was a table that was empty, and he goes okay, tell me what happened. And I'd sit down there –
> Q. Without – without saying what – what you said, did you tell him what happened?
> A. Yes. I sat down on the chair and he was leanin' over the table like this (indicating) um, and I was tellin' him what happened.
> Q. Okay. Did anything happen after that?
> A. Ah, just as I had sat down and had started telling Dave what had happened,

um, Curtis Ketcham came up – I assumed from outside – and he'd told Dave, "I just seen every-"

> [The prosecutor]: Objection, Your Honor. Hearsay.
> [Defense]: That's fine.
> THE COURT: Sustained.

Q. Um, Curtis Ketcham came up?
A. Yes.
Q. Was there some conversation between Curtis and Big Dave?
A. No. Curtis was –
Q. With – without saying what Curtis said.
A. Okay.
. . . .
A. Um, Curtis had approached and right when he started to speak, um, and I – I looked up at him, that's when, ah, the other gentleman with the cowboy hat was standing directly in front of my table beside Dave. Dave was on my left and I was sittin' here at the end of the table, Dave was leaning over the table, and the other gentleman with the cowboy hat was right in front, um, huffin' and puffin' and – he was clearly upset.
Q. Okay.
A. And that's – I told Dave I said, "Look. This is his buddy. I don't even know these guys, this guy wants to fight me, too."

> [The prosecutor]: Your Honor, I object. Hearsay. Move to strike the witness's last response. I'd ask to approach. (Sidebar conference:) . . . Involving tangents. I'd ask that the narrative questions be put to conclusion and ask that the leading questions come to an end. I think he can ask direct questions, but he can't open it up with questions that are clearly gonna call for hearsay.
> [Defense]: I think I'm asking – if I'm asking leading questions, you can tell me. But I'm –I'm asking him what happened next. I'm not asking him specifically if this or that happened.
> [The prosecutor]: I just don't believe we can get into conversation.
> THE COURT: What's your response to the objection if you –
> [Defense]: He said – I'm not – for the truth in what was of the – the truth of the matter asserted, I'm gonna offer for what the briefs – just what all happened prior to him being jumped on by a – second individual.
> [The prosecutor]: It's – it's self-serving hearsay, Your Honor. That's exactly what (inaudible).
> [Defense]: Well, if it's – it's what [Swartzentruber] had said. I mean, I understand it's out-of-court statement, but it's what [Swartzentruber] had said that he – that he said, um, to big – to Big Dave. And I don't think I'm

not offering – that the truth that this guy was gonna – wanted to fight him, but it's what [Swartzentruber] responded to when he saw the puffing by, um, by the second – by Billy Ford.
THE COURT: I'll sustain the objection, but – and I'll strike the answer, and you can go on from there.
[Defense]: Okay.

THE COURT: Objection sustained. Ladies and gentlemen, you will disregard the last answer of the witness.

[The prosecutor]: Thank you, Your Honor.

Q. [by Defense]: . . . you can't say what anybody said, okay?
A. Okay.
Q. 'Cause that's hearsay.
A. All right.

App. at 247-50.

After the above exchange, Swartzentruber proceeded to recount what happened thereafter. *Id*. at 250-53. Swartzentruber testified that he went with the bartender into a back room, sat at a table, and told him what had happened. A man with a hat was also there, "breathing hard in [an] aggressive stance staring at" Swartzentruber. *Id.* at 251. Despite the hearsay prohibition, Swartzentruber was permitted to testify without objection that when the bartender saw the man with the hat, "he immediately stood up and said no, this isn't gonna [sic] on in my bar, I'm gonna escort you out." *Id*. After escorting the man with the hat out, the bartender asked Swartzentruber to leave. Upon his departure, Swartzentruber was "thrown to the ground" by the man with the hat, and "everybody in the bar jumped on top." *Id*. at 252. Thus, Swartzentruber *was* permitted to testify in detail regarding the events that followed his encounter with Garland. Given all that the jury did hear regarding the events of the night in question, Swartzentruber has not convinced us that he was prejudiced when the

jury was instructed to disregard the arguably self-serving hearsay statement, "Look. This is his buddy. I don't even know these guys, this guy wants to fight me, too." *Id.* at 249. Swartzentruber has not demonstrated an abuse of discretion in the trial court's rulings on evidentiary matters.

Affirmed.

BAKER, J., and VAIDIK, J., concur.